90-848

No. _____

Supreme Court, U.S.
FILED
NOV 29 1990
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1990

KENNETH HILTON,

Petitioner,

v.

SOUTH CAROLINA PUBLIC RAILWAYS COMMISSION,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of South Carolina

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Are the remedies provided by the Federal Employers' Liability Act, 45 U.S.C. §51 *et seq.*, available to employees injured while working in furtherance of interstate commerce for railroads owned and operated by a state?

2. Does a state that voluntarily engages in interstate railroad commerce thereby consent to the applicability of the Federal Employers' Liability Act, 45 U.S.C. §51 *et seq.*?

3. Does the opinion of the South Carolina Supreme Court in this case conflict with decisions of this Court holding that the federal statutory regulation of this Nation's railroads, including the FELA laws, pervasively pre-empt the field and apply to state-operated railroads?

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No. _____

In The

Supreme Court of the United States

October Term, 1990

KENNETH HILTON,

Petitioner,

v.

SOUTH CAROLINA PUBLIC RAILWAYS COMMISSION,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of South Carolina

PETITION FOR WRIT OF CERTIORARI

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The date of the Opinion of the South Carolina Supreme Court is July 20, 1990 (see Appendix C). The date of denial of a timely Petition for Rehearing was September 4, 1990 (see Appendix A). The statutory provision believed to confer jurisdiction on this Court is 28 U.S.C. §1257(a):

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had . . . where any title, right, privilege, or immunity is specially set up or claimed

under the Constitution . . . or statutes of . . . the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I Section 8, Clause 2, of the U.S. Constitution:

The Congress shall have Power . . . To regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes.

45 U.S. Code, Section 51:

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in while or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in

any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

STATEMENT OF THE CASE

Plaintiff originally filed his action in the United States District Court. Following the decision in *Welch v. Texas Dept. of Highways and Public Trans.*, 483 U.S. 468, 107 S.Ct. 2941, 97 L.Ed.2d 389 (1987), Plaintiff voluntarily dismissed that action and refiled his claim in the appropriate state court in South Carolina (see Appendix H). Plaintiff's Complaint there alleged that he was injured while employed by an interstate railroad and that he was entitled to the remedies provided by 45 U.S.C. §51 *et seq.* The Defendant filed a Motion to Dismiss, claiming that the State-operated railroad was not subject to the provisions of the FELA (see Appendix G). The trial court granted the Motion to Dismiss (see Appendix F). Plaintiff timely filed a Motion for Rehearing. The rehearing was denied by the trial court (see Appendix E). A timely appeal was then filed in the South Carolina Supreme Court. That Court affirmed the dismissal of Plaintiff's Complaint, holding that the provisions of 45 U.S.C. §51 *et seq.* did not apply to the state-owned railroad (see Appendix C). A timely Motion for Rehearing was denied by the South Carolina Supreme Court (see Appendix A, B). All rulings in the Supreme Court of South Carolina were predicated upon its earlier disposition of a similar case: *Freeman v. South Carolina Public Railways Comm.*, 393 S.E.2d 383 (1990) (see Appendix D).

FEDERAL QUESTION FACTORS

Plaintiff invoked the Federal question into this litigation by specifically claiming in his Complaint the rights afforded by 45 U.S.C. §51, *et seq.* (see Appendix H). The Defendant raised the applicability of the federal statute in its Motion to Dismiss, such defense being accepted by the trial court in its Order of Dismissal and by the Supreme Court of South Carolina in its Opinion affirming the trial court (see Appendix C, F, G).

ARGUMENT AMPLIFYING REASONS RELIED ON FOR ALLOWANCE FOR WRIT

Petitioner contends the ruling of the South Carolina Supreme Court (denying the protection of the FELA to an employee of an interstate railroad, owned by a state, who was injured in the course and scope of his work activities for that railroad) "conflicts with applicable decisions of this Court." [See Supreme Court Rule 10(c)]

Petitioner contends that the following decisions indicate that state-operated railroads are in fact subject to the provisions of the FELA:

> *Port Authority Trans-Hudson Corp. v. Feeney*, 58 L.W. 4536 (U.S. S.Ct. April 30, 1990) – a unanimous Court ruled that the state agency there involved (PATH) had consented to federal court jurisdiction in a FELA context. [While the thrust of the case centered upon the Eleventh Amendment immunity from states being sued in federal court, no member of the Court suggested that the FELA was not applicable to the state railroad. Indeed, that case would have been moot if the FELA were inapplicable!]

> *Parden v. Terminal Railway of Alabama Docks Dept.*, 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed.2d 233 (1964) – holding both that the FELA applied to state railroads *and* that the states were subject to federal court jurisdiction in FELA cases. [The jurisdictional aspect of the holding was overruled in *Welch v. Texas Dept. of Highways and Public Transportation*, 483 U.S. 468, 107 S.Ct. 2941, 97 L.Ed.2d 389 (1987), but the Court specifically declined to address the continued viability of the "applicability" holding in *Parden*.]
>
> *Petty v. Tennessee-Missouri Bridge Comm.*, 359 U.S. 275, 79 S.Ct. 785, 3 L.Ed. 2d 804 (1959) – holding that the Jones Act [FELA] affords a remedy to seamen employed by states. [Justice White, concurring, asserted this holding survived the *Welch* decision, 107 S.Ct. 2941, 2947.][1]

Further, the Opinion of the South Carolina Supreme Court contravenes other decisions recognizing that state-owned railroads are subject to the comprehensive federal regulation that has been in place for approximately 100 years in this Country.

---

[1] Indeed, the Reporter of Decisions for opinions of the Court sums up the *remedy* holding in *Welch* (as classified or "headnoted" for inclusion in U.S. Supreme Court Digest, Lawyers' Edition) thusly:

> Federal Employers' Liability and Compensation Acts §55 – Jones Act – action against state
>
> 3a-3c. The Jones Act (46 USCS Appx §688) affords a remedy to seamen employed by the state who suffer personal injury in the course of their employment. [Per White, Brennan, Marshall, Blackmun, and Stevens, JJ.]

In *United Transportation Union v. Long Island Railroad Co.*, 455 U.S. 678, 102 S.Ct. 1349, 71 L.Ed.2d 547 (1982) (hereafter "UTU"), the Court held that the Railway Labor Act, 45 U.S.C. §151 *et seq.*, applied to the state-owned Long Island Railroad, thereby permitting its employees to strike even though strikes by state employees were prohibited under state law:

> The determination of whether a federal law impairs a state's authority with respect to "areas of traditional [state] functions" may at times be a difficult one. In this case, however, we do not write on a clean slate. As the District Court noted, in *National League of Cities* we explicitly reaffirmed our holding in *United States v. California*, 297 U.S. 175, 56 S.Ct. 421, 80 L.Ed. 567 (1936), and in two other cases [*Parden v. Terminal R. Co.*, 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed.2d 233 (1964) and *California v. Taylor*, 353 U.S. 553, 77 S.Ct. 1037, 1 L.Ed.2d 1034 (1957)] involving federal regulation of railroads:
>
> > The holding of *United States v. California* . . . is quite consistent with our holding today. There California's activity to which the congressional command was directed was not in an area the States have regarded as integral parts of their governmental activities. It was, on the contrary, the operation of a railroad engaged in 'common carriage by rail in interstate commerce . . . ' 297 U.S. at 182 [56 S.Ct. 432]. 426 U.S. at 854 n. 18, 96 S.Ct. 2465, n. 18.
>
> 455 U.S. at 685.

The South Carolina court erroneously applied non-railroad precedents in concluding that the longstanding Federal regulation of this Nation's railroads did not

extend to state-operated rail carriers involved in interstate commerce. In its *Freeman* decision, the Supreme Court of South Carolina concluded that *Welch's* "unmistakably clear" test (for language required to abrogate the immunity of a state from being sued in federal court) was the appropriate test for determining the breadth of statutory application (393 S.E.2d at 384). In railroad statutory construction, however, the invariable holdings have subjected the states to the federal regulatory power. When urged to find that states are beyond the scope of federal rail legislation, this Court has repeatedly declined to exempt the states.

It is, of course, true that *Welch* requires great exactitude to overcome a state's Eleventh Amendment immunity from federal court jurisdiction. However, it is also true that the decisions in *United States v. California, California v. Taylor, Parden* and *UTU* reveal a quite different test to determine the applicability to the states of the laws Congress enacted to govern the railroad industry in America. These controlling decisions, emphasizing the national need for a uniform pattern of laws governing railroad operations, have unfailingly subjected state rail lines to the federal scheme of things, *even though none of these statutes referred specifically to public railroads as being within their coverage.* In fact, the Court has consistently interpreted the federal railroad laws as applicable to states even while *conceding* that Congress never specified or even considered whether state entities would be encompassed by these laws. This pattern was reviewed in *California v. Taylor*, 353 U.S. 533, 77 S.Ct. 1037, 11 L.Ed.2d 1034 (1957), where the Court observed:

[F]ederal statutes regulating interstate railroads, or their employees, have consistently been held to apply to publicly owned or operated railroads. Yet none of these statutes referred specifically to public railroads as being within their coverage. In *United States v. California*, [297 U.S. 175, 56 S.Ct. 421, 80 L.Ed. 567] . . . the State contended there, as it does here, that the Act was inapplicable to the Belt Railroad because a federal statute is presumed not to restrict a constituent sovereign State unless it expressly so provides. The Court said that this presumption "is an aid to consistent construction of statutes of the enacting sovereign when their purpose is in doubt, but it does not require that the aim of a statute fairly to be inferred be disregarded because not explicitly stated." 297 U.S. at page 186, 56 S.Ct. at page 425 . . . The Court then held unequivocally that the Safety Appliance Act was applicable to the Belt Railroad. "We can perceive no reason for extending it [the presumption] so as to exempt a business carried on by a state from the otherwise applicable provisions of an act of Congress, all embracing in scope and national in its purpose, which is as capable of being obstructed by state as by individual action." 297 U.S. at 186.

Nothing in the legislative history of the Railway Labor Act indicates that it should be treated differently from the above-mentioned railway statutes, insofar as its applicability to a state-owned railroad is concerned. Congress apparently did not discuss the applicability of the Railway Labor Act to a state-owned railroad. This omission is readily explainable in view of the limited operations of publicly owned railroads. We are told by the parties that there are today 30 publicly owned railroads, all of which are switching or terminal roads, and only 11 of which are operated directly by the public. The

fact the Congress chose to phrase the coverage of the Act in all-embracing terms indicates that state railroads were included within it. In fact, the consistent congressional pattern in railway legislation which preceded the Railway Labor Act was to employ all-inclusive language of coverage with no suggestion that state-owned railroads were not included.

The State contends that doubts are created about congressional intent to make the Railway Labor Act applicable to state owned railroads by the fact that in certain other federal statutes governing employer-employee relationships, Congress has expressly exempted employees of the United States or of a State. We believe, however, that this argument cuts the other way. When Congress wished to exclude state employees, it expressly so provided.

Id. 353 U.S. at 562-563, 77 S.Ct. at 1042-1044.

As to any "sovereign right" a state railway may assert so as to exempt it from federal control, the federal superiority of the commerce power over state-owned railroads engaging in interstate commerce was reiterated by the Court in the *California v. Taylor* decision:

> Finally, the State suggests that Congress has no constitutional power to interfere with the "sovereign right" of a State to control its employment relationships on a state owned railroad engaged in interstate commerce. In *United States v. State of California, supra*, this Court said that the State, although acting in its sovereign capacity in operating this Belt Railroad, necessarily so acted "in subordination to the power to regulate interstate commerce, which has been granted specifically to the national government." 297

> U.S. at page 184, 56 S.Ct. at page 424. "California, by engaging in interstate commerce by rail, has subjected itself to the commerce power, and it liable for a violation of the Safety Appliance Act, as are other carriers . . . " *Id.* 297 U.S. at page 185, 56 S.Ct. at page 424. That principle is no less applicable here. If California, by engaging in interstate commerce by rail, subjects itself to the commerce power so that Congress can make it conform to federal safety requirements, it also has subjected itself to that power so that Congress can regulate its employment relationships.
>
> *Id.* 353 U.S. at 568-569, 77 S.Ct. at 1045-1046.

In the process of statutory construction to determine the applicability of federal railroad legislation to the states, the Court is thus seen to have *not required exactitude* but has consistently included states within the scope of federal railroad statutes using identical terms of application to those used in the FELA.

Further, in *Freeman*, the South Carolina court considered as "dispositive" the ruling in *Will v. Michigan Dept. of State Police*, 491 U.S. ___, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989), in concluding its opinion by stating "As in *Will*, we find no rationale to subject States to FELA liability in State Courts, when Congress has expressed no intent to so subject them in Federal Court" (393 S.E.2d at 384). In a footnote on the same page, the South Carolina court acknowledged the decision [simultaneously issued with the *Will* opinion] in *Pennsylvania v. Union Gas*, 491 U.S. ___, 109 S.Ct. 2273, 105 L.Ed.2d 1 (1989). By ignoring this Court's "rationale" as explicated in *United States v. California, California v. Taylor, Parden* and *UTU*, the court

below bootstrapped itself into granting South Carolina an immunity that is broader than that afforded by Federal law. That, of course, is (emphatically) impermissible under this Court's holding in *Howlett v. Rose*, ___ U.S. ___ 110 S.Ct. 2430, 110 L.Ed.2d 332 (1990).

Petitioner contends that the precedents of this Court relating to the scope of Federal regulatory authority over interstate rail commerce constitute an "unmistakably clear" showing that 45 U.S.C. §51 applies to state entities engaged in such commerce.

CONCLUSION

The factors enumerated in the concluding paragraph of Justice White's opinion for the Court in *Welch* (Part IV C)[1] are equally applicable here:

1. The slate is *not* clean; this factor was noted by Chief Justice Burger in his opinion for a unanimous Court in *UTU* (455 U.S. at 684).

---

[1] In deciding yet another Eleventh Amendment case, we do not write on a clean slate. The general principle of state sovereign immunity has been adhered to without exception by this Court for almost a century. The dissent nevertheless urges the Court to ignore stare decisis and overrule the long and unbroken series of precedents reaffirming this principle. If the Court were to overrule these precedents, a number of other major decisions also would have to be reconsidered. As we have stated above, supra, at 9, the doctrine of stare decisis is of fundamental importance to the rule of law. For this reason, "any departure from the doctrine . . . demands special justification." 467 U.S. at 212.

2. The principle of law subjecting States to railway regulation has been adhered to without exception for many decades.

3. No special reason exists to repudiate the controlling precedents.

This Petition should be granted for the purpose of removing any doubt about the continued viability of this Court's precedents. The Supreme Court of South Carolina should not (as, indeed, it cannot) overrule *Parden*.

Respectfully submitted,

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and

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Counsel for Petitioner

No. _____

In The

Supreme Court of the United States

October Term, 1990

KENNETH HILTON,

Petitioner,

v.

SOUTH CAROLINA PUBLIC RAILWAYS COMMISSION,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

SEAL

THE SUPREME COURT OF SOUTH CAROLINA

CLYDE N. DAVIS, JR.
CLERK
BRENDA F. SHEALY
DEPUTY CLERK

P.O. BOX 11330
COLUMBIA, S.C. 29211
PHONE NO. 734-1080

September 4, 1990

Donald B. Clark, Esquire
P. O. Box 893
Charleston, S. C. 29402

Re: Kenneth Hilton v. South Carolina Public Railways Commission

Dear Mr. Clark:

The Court has refused your Petition for Rehearing in the above case in the following order:

"Petition for Rehearing denied.

/s/ George T. Gregory, Jr. C.J.
/s/ David W. Harwell A.J.
/s/ A. Lee Chandler A.J.
/s/ Ernest A. Pinney, Jr. A.J.
/s/ Jean H. Toal A.J.

September 4, 1990."

The remittitur in this matter is today being forwarded to the Clerk of Court for Charleston County.

Sincerely yours,
/s/ Clyde N. Davis Jr.
CLERK

CND,Jr./dmh

cc: Robert J. Beckham, Esquire
Keating L. Simons, III, Esquire

APPENDIX B

IN THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
THE HONORABLE ELLIS B. DREW
CIVIL ACTION NO. 88-CP-10-705

KENNETH HILTON, Plaintiff-Appellant, versus SOUTH CAROLINA PUBLIC RAILWAYS COMMISSION, Defendant.	)	PETITION FOR REHEARING

COMES NOW Plaintiff-Appellant, pursuant to Rule 17, Rules of Practice in the Supreme Court and the Court of Appeals, and submits his Petition for Rehearing. Plaintiff-Appellant respectfully suggests that the Court has overlooked or failed to consider the following substantial matters:

1. This matter was disposed of without separate opinion pursuant to Rule 23, Rules of Practice in the Supreme court and the Court of Appeals, and the Court's prior ruling in *Freeman v. South Carolina Public Railways Commission*, ___ S.C. ___, ___ S.E.2d ___ (S.Ct. 1990) (Slip Opinion, No. 23234, filed July 2, 1990). In that decision, the Court failed to acknowledge that a majority (five) of the Justices of the United States Supreme Court in the plurality opinion of *Welch v. U.S. Dept. of Transportation*, 483 U.S. 468, 107 S.Ct. 2941, 97 L.Ed.2d 289 (1987) stated implicitly or explicitly that states were subject to suit in state courts under the Federal Employers' Liability Act (the "FELA"), because the concurring opinion of Justice

White in that case clearly reflects that a majority of the Court adhered to the view that the Jones Act, applicable to the same extent as the FELA, "affords a remedy to seamen employed by the States." *Id.* 483 U.S. at ___, 107 S.Ct. at 2957. See also the headnote, 97 L.Ed.2d at 392. It is respectfully submitted that if the Jones Act affords a remedy in the State courts to seamen employed by the States, then the FELA must also surely afford a remedy in the State courts to railway workers employed by the States.

2. The Court failed to acknowledge the significance of the supplemental authority submitted by Plaintiff-Appellant, *Port Authority Trans-Hudson Corp v. Feeney*, 110 S.Ct. 1868, 109 L.Ed.2d 264, 58 U.S.L.W. 4536 (April 30, 1990), wherein the unanimous Court assumed that the " . . . suit must be considered as one against the States," *Id.* 110 S.Ct. at 1872, in applying the FELA to a bi-state agency, but no member of the Court questioned whether the scope of the FELA language was inadequate to encompass such state employees.

3. The Court overlooked the important public policy concepts involved in the proper assessment of federal rail legislation, as enunciated by the United States Supreme Court in *United Transp. Union v. Long Island R. Co.*, 455 U.S. 678, 102 S.Ct. 1349, 71 L.Ed.2d 547 (1982):

> (a) In determining the scope of federal power regulating railroads, " . . . we do not write on a clean slate." *Id.* 455 U.S. at 684, 102 S.Ct. at 1354.
>
> (b) There appears to be no sound justification for a rule which would allow the states, by acquiring functions previously performed by the private sector, to erode federal authority in

areas traditionally subject to federal statutory regulation. Railroads have been subject to comprehensive federal regulations for nearly a century. *Id.* 455 U.S. at 687, 102 S.Ct. at 1354.

(c) "In addition, a state acquiring a railroad does so knowing that the railroad is subject to this long-standing and comprehensive scheme of federal regulation of its operations . . . " *Id.* 45 U.S. at 689-690, 102 S.Ct. at 1356. [Acknowledging that states which operate railroads in interstate commerce in effect "consent" to federal regulation – the same concept enunciated in the majority opinion in *Pennsylvania v. Union Gas*, 491 U.S. ___, 109 S.Ct. 2273, 105 L.Ed.2d 1 (1989) decided on the same date as the decision in *Will v. Michigan Dept. of State Police*, 491 U.S. ___, 109 S.Ct. 3204, 105 L.Ed.2d 45 (1989).

4. The Court overlooked the fact that the same five Justices who formed the majority in *Welch v. U.S. Dept. of Transportation* (affirming the applicability of the federal law to state owned operations) also constituted the majority in *Pennsylvania v. Union Gas*, 491 U.S. ___, 109 S.Ct. 2273, 105 L.Ed.2d 1 (1989), decided on the same date as the decision in *Will v. Michigan Dept. of State Police*, 491 U.S. ___, 109 S.Ct. 3204, 105 L.Ed.2d 45 (1989), which fact clearly supports the proposition that the *Will* opinion did not erode the majority position in *Welch*. The *Will* decision must be read as being consistent with the *Union Gas* decision, especially when they were issued contemporaneously.

5. Although appellate court decisions of at least two other states (Texas and Louisiana) appear to indicate that their doors will remain open to FELA claims against the states, Plaintiff-Appellant believes the *Freeman* case and this case are the first state appellate court decisions in the

United States to expressly discuss the issue presented, an issue which is not only one of great historical and practical significance in general, but one which may determine whether Plaintiff-Appellant will have any recourse for the debilitating and permanent injuries he received in the course of his employment with the Respondent. This Court's decision appears to break with a long tradition which has established that federal railway regulation preempts the field and must be applied *uniformly* throughout the country, regardless of who owns the railroad. As such, the Court should entertain additional arguments before permanently committing itself to a decision that may prove to be out of step with future state appellate court decisions which will undoubtedly arise in other jurisdictions.

Wherefore, Plaintiff-Appellant respectfully requests that this Honorable Court consider his Petition for Rehearing and permit him through his counsel to address these points more fully before the Court.

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ATTORNEYS FOR PLAINTIFF-APPELLANT

Charleston, South Carolina

July 28, 1990

APPENDIX C

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Kenneth Hilton,

Appellant,

v.

South Carolina Public Railways Commission,

Respondent.

Appeal From Charleston County
Ellis B. Drew, Judge

Memorandum Opinion No. 90-MO-213
Heard February 21, 1990 – Filed July 20, 1990

AFFIRMED

Donald B. Clark, of Rosen, Rosen & Hagood, of Charleston; and Robert J. Beckham, of Beckham, McAliley & Schulz, P.A., of Jacksonville, Florida, for appellant.

Keating L. Simons, III, of Holmes & Thompson, of Charleston, for respondent.

PER CURIAM: Affirmed pursuant to Supreme Court Rule 23 and under the authority of *Freeman v. South Carolina Public Railways Commission*, Op. No. 23234 (S.C. Sup. Ct. filed July 2, 1990) (a suit under the Federal

Employer's Liability Act (FELA) may not be maintained against this state in state courts).

/s/ George T. Gregory, Jr. C.J.
/s/ David W. Harwell A.J.
/s/ A. Lee Chandler A.J.
/s/ Ernest A. Pinney, Jr. A.J.
/s/ Jean H. Toal A.J.

APPENDIX D

Johnny R. FREEMAN, Appellant,

v.

SOUTH CAROLINA PUBLIC RAILWAYS COMMISSION,
Respondent.

No. 23234.

Supreme Court of South Carolina.

Heard Feb. 6, 1990.

Decided July 2, 1990.

Railway conductor filed personal injury suit under Federal Employers' Liability Act (FELA) in state court. The Circuit Court, Charleston County, Ellis B. Drew, Jr., Special Judge, dismissed action. Conductor appealed. The Supreme Court, Chandler, J., held that state was not subject to suit under FELA in state court in absence of unmistakably clear language in FELA expressing congressional intent to subject states to suit in federal courts.

Affirmed.

1. States ⇐191(1.25)

State was not subject to suit under Federal Employers' Liability Act (FELA) in state court absent unmistakably clear language in the Act abrogating state's immunity. Federal Employers' Liability Act, §§ 1 et seq., 6, 45 U.S.C.A. §§ 51 et seq., 56; U.S.C.A. Const. Amend. 11.

2. Federal Courts ⇐265

Eleventh Amendment bars suits in federal court against citizen's own state. U.S. C.A. Const.Amend. 11.

3. Federal Courts ⇐265

Eleventh Amendment does not bar suits against state in state court. U.S.C.A. Const.Amend. 11.

4. Federal Courts ⇐265

Congress will not be deemed to have overridden state's Eleventh Amendment immunity from suit in federal court unless Congress has, in fact, done so in unmistakably clear language in pertinent statute. U.S.C.A. Const.Amend. 11.

Donald J. Budman, of Solomon, Kahn, Smith & Baumil, Charleston, for appellant

Keating L. Simons, III, of Holmes & Thompson, Charleston, for respondent.

CHANDLER, Justice:

Johnny R. Freeman (Freeman) appeals an Order dismissing his action against Respondent, South Carolina Public Railways Commission (Railway).[1]

We affirm.

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[1] Railway is an agency of the State of South Carolina.

FACTS

Freeman, a conductor for Railway, was injured in July, 1986, while in the scope of his employment. Thereafter, he brought suit alleging Railway's liability under the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51 *et seq.*[2] Circuit Court dismissed Freeman's complaint, holding that a FELA suit may not be maintained against a State in its Courts.

ISSUE

[1] The sole issue is whether a State may be subjected in its own Courts to FELA actions.

DISCUSSION

In *Parden v. Terminal Railway of Alabama*, 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed.2d 233 (1964), the U.S. Supreme Court held that an employee of a State owned railroad may maintain a FELA action against the State in Federal Court.

In reaching its decision, the Court addressed two issues: (1) Did Congress, in enacting FELA, intend to subject State owned railways to suit? and (2) Did Congress have the power to do so as against a State's claim of sovereign immunity?

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[2] FELA subjects every common carrier by railroad engaging in interstate commerce to liability to employees injured as a result of the carrier's negligence. State Courts have concurrent jurisdiction with Federal Courts in FELA suits. 45 U.S.C. § 56.

Issue One: The Court held that the language *"every* co.mon carrier by railroad in interstate commerce" was all embracing, and indicated Congress' intent that State owned railways be included within its terms. Accordingly, the Court read FELA to authorize Federal suits against State owned railways.

Issue Two: Having decided that FELA authorizes such suits, the Cour: then held that Congress had the *power* to abrogate a State's immunity, stating "the States surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce." 377 U.S. at 191, 84 S.Ct. at 1212, 12 L.Ed.2d at 239.

[2-4] Thereafter, in *Welch v. State Department of Transportation*, 483 U.S. 468, 107 S.Ct. 2941, 97 L.Ed.2d 389 (1987), the Court overruled the first holding of *Parden* to the extent that it "is inconsistent with the requirement that an abrogation of Eleventh Amendment immunity by Congress must be expressed in *Unmistakably clear* language . . . " 483 U.S. at 478, 107 S.Ct. at 2948, 97 L.Ed.2d at 399 [Emphasis supplied].[3] Accordingly, absent such

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[3] The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. const. amend. XI.

This amendment also bars suits in Federal Court against a citizen's own state. *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890). However, the Eleventh Amendment does not bar suits against a State in State Court. *See, Nevada v. Hall*, 440 U.S. 410, 99 S.Ct. 1182, 59 L.Ed.2d 416 (1979).

language, the Eleventh Amendment bars FELA suits in Federal Court.[4]

The issue remains, however, whether a State may, nonetheless, be subjected to FELA liability in *State* Courts. The recent U.S. Supreme Court decision in *Will v. Michigan Dept. of State Police*, 491 U.S. ___, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989), is dispositive of that issue.

Will involved a 42 U.S.C. § 1983 suit brought against the State of Michigan in a Michigan State Court. The Court stated:

> If Congress intends to alter the usual Constitutional balance between the States and the Federal government, it must make its intention to do so unmistakably clear in the language of the statute. *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985) . . . *Atascadero* was an Eleventh Amendment case, but a similar approach is applied in other contexts. Congress should make its intention 'clear and manifest' if it intends to pre-empt the historic powers of the States (citation omitted).

491 U.S. at ___, 109 S.Ct. at 2308, 105 L.Ed.2d at 54.

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[4] *Welch* explicitly left open the second holding of *Parden*, i.e., Congress' power to abrogate Eleventh Amendment immunity. This issue was recently resolved in *Pennsylvania v. Union Gas*, 491 U.S. ___, 109 S.Ct. 2273, 105 L.Ed.2d 1 (1989) in which the Court stated that Congress' "power to regulate commerce includes the power to override State's immunity from suit, but *we will not conclude that congress has overridden this immunity unless it does so clearly.*" 491 U.S. at ___, 109 S.Ct. at 2281, 105 L.Ed.2d at 16 (Emphasis supplied). Accordingly, the fact that Congress has the *power* to override immunity is irrelevant unless it has, in fact, done so in unmistakably clear language.

Accordingly, in *Will*, after finding that § 1983 did not contain language unmistakably subjecting States to liability, the Court stated "we cannot accept petitioner's argument that Congress intended nevertheless to create a cause of action against States to be brought in State Courts . . . " 491 U.S. at ___, 109 S.Ct. at 2309, 105 L.Ed.2d at 55.

Welch makes manifest the absence in FELA of the requisite "unmistakably clear language." As in *Will*, we find no rationale to subject States to FELA liability in State Courts, when Congress has expressed no intent to so subject them in Federal Court.

AFFIRMED.

GREGORY, C.J., and HARWELL, FINNEY and TOAL, JJ., concur.

APPENDIX E

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON KENNETH HILTON, Plaintiff, vs. SOUTH CAROLINA PUBLIC RAILWAYS COMMISSION, Defendant.	)	IN THE COURT OF COMMON PLEAS CASE NO. 88-CP-10-705 ORDER

THIS MATTER is before the Court upon Plaintiff's Motion for Reconsideration of Order of Dismissal of FELA claim, or in the alternative, for Certification of said Claim under Rule 54(b), dated November 8, 1988. Plaintiff's Motion was supported by a Memorandum of Law filed with the Motion. Defendant filed a Memorandum of Law in Opposition dated November 21, 1988 and a Supplemental Memorandum dated November 23, 1988. The parties have agreed upon the Court's resolution of the issue upon the briefs without necessity of a hearing.

MOTION FOR RECONSIDERATION

Plaintiff first argues that this Court erred in "finding" that the State of South Carolina has not consented to FELA liability. Contrary to Plaintiff's argument, there was no such "finding," nor did the Court go outside the record in addressing this issue. Plaintiff failed to allege the State's consent in his Complaint. The Court rejects this ground for the requested reconsideration.

Plaintiff goes on to argue, as its sole alternative ground for reconsideration, that in empowering the South Carolina Public Railways Commission "to sue and be sued" the General Assembly waived the Commission's sovereign immunity and subjected the Commission to FELA liability. Plaintiff urges, quite correctly, that the General Assembly is presumed to know the law. However, it has long been the law in South Carolina that empowering a state agency to sue and be sued is, "not intended as a waiver of the immunity of [the state agency] from tort liability and does not have that effect." *Graham v. Charleston County School Board*, 262 S.C. 314, 317, 204 S.E.2d 384 (1974); *Boyce v. Lancaster County Natural Gas Authority*, 266 S.C. 398, 223 S.E.2d 769 (1976); *Rice Hope Plantation v. South Carolina Public Service Authority*, 216 S.C. 500, 59 S.E.2d 132 (1950); and *Sherbert v. School District No. 85, Spartanburg County*, 169 S.C. 191, 168 S.E. 391 (1932). Thus, the legal affect of the "sue and be sued" language, knowledge of which the General Assembly is presumed to have had, establishes just the converse of that which Plaintiff urges. At the time the General Assembly empowered the South Carolina Public Railways Commission to sue and be sued it did so knowing that such language would not amount to a waiver of sovereign immunity from actions, such as this one, seeking to impose tort liability upon an instrumentality of the State of South Carolina.

This Court has carefully considered Plaintiff's arguments and authorities and, upon reconsideration, adheres to the views expressed in its prior Order.

ENTRY OF JUDGMENT UNDER S.C.R.C.P. 54(b)

Plaintiff also seeks, by way of alternative relief, an Order pursuant to S.C.R.C.P. 54(b) directing entry of a final judgment against Plaintiff as to the FELA cause of action. Defendant initially opposed a separate entry of judgment but in its Supplemental Memorandum Defendant assented to the requested entry of judgment provided that an Order be issued staying any further litigation of the claims presented by Plaintiff in his Amended Complaint. This Court believes that it is in the best interests of all concerned that the purely legal question of the applicability of the FELA to this Defendant be heard at the appellate level. At the same time, however, no interests of justice or of judicial economy are served by having this matter proceed in the appellate courts and in the trial court simultaneously. There being no just reason for delay it is

ORDERED that Plaintiff's Motion for Reconsideration be denied; and it is

FURTHER ORDERED that judgment in favor of Defendant and against Plaintiff on his Complaint be immediately entered; and it is

FURTHER ORDERED that the remainder of this action be and the same is hereby stayed pending further order of this Court.

AND IT IS SO ORDERED.

/s/ Ellis B. Drew
Ellis B. Drew
Judge, Tenth
Judicial Circuit

ANDERSON, S.C.
December 7, 1988

ATTEST: A TRUE COPY
HOWARD A. TAYLOR (SEAL)
CLERK
By David Alston
DEPUTY CLERK

APPENDIX F

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON KENNETH HILTON, Plaintiff, vs. SOUTH CAROLINA PUBLIC RAILWAYS COMMISSION, Defendant.	)	IN THE COURT OF COMMON PLEAS CASE NO. 88-CP-10-705 ORDER FILED NOV 3 1988

THIS MATTER is before the Court upon Defendant's Motion to Dismiss filed April 4, 1988. A hearing was had on July 14, 1988 with the parties appearing through counsel. Plaintiff was represented by Donald B. Clark, Esquire, of the Charleston Bar and by R. J. Beckham, Esquire of the Florida Bar who was admitted to practice before the Court *pro hac vice*, and Defendant was represented by Keating L. Simons, III, Esquire, of the Charleston Bar. The Court invited the submission of briefs by the parties and after consideration of same, together with the arguments advanced by counsel at the hearing, the Court reaches the conclusions hereinafter stated.

STATEMENT OF FACTS

The Defendant South Carolina Public Railways Commission is a statutory creation and an agency of the State of South Carolina. Section 58-19-10, *et seq.*, Code of Laws of South Carolina (1976). The Complaint makes no allegations to the contrary and alleges that Defendant is engaged as a common carrier in interstate commerce by railroad. Plaintiff goes on to allege that he was injured

while in the course and scope of his employment duties with Defendant and, as a consequence, is entitled to monetary relief from Defendant pursuant to the FELA.

For purposes of Defendant's S.C.R.C.P 12(b)(6) Motion to Dismiss, the Court assumes as true the facts that Defendant is a common carrier engaged in interstate commerce by railroad and that Plaintiff was injured while about the course and scope of his duties with Defendant railroad. However, the Court must accept as fact the proposition that Defendant is an agency or instrumentality of the State of South Carolina and it is on that ground that Defendant bases the instant Motion.

INTRODUCTION

For many years the FELA has been applied to state-owned railroads. The dominant case on this issue was *Parden v. Terminal Railway*, 377 U.S. 184, 12 L.Ed.2d 233, 84 S.Ct. 1207, Reh. Den. 377 U.S. 1010, 12 L.Ed.2d 1057, 84 S.Ct. 1903 (1964). *Parden* held that the FELA applied to state-owned railroads and that the Eleventh Amendment did not bar an FELA action against a state-owned railroad in federal court. However, on June 25, 1987, the United States Supreme Court overruled *Parden* in *Welch v. State Dept. of Highways and Public Trans.*, 483 U.S. ___, 97 L.Ed.2d 389, 107 S.Ct. 2941 (1987). In *Welch*, which involved a seaman's relief under the Jones Act, the court held that the language, "any seaman who shall suffer personal injury in the course of his employment," found in Section 33 of the Jones Act, was not unmistakable statutory language sufficient to authorize a Jones Act suit against a state in federal court.

Since the *Welch* decision a number of FELA cases against state instrumentatalities have been dismissed by federal courts for lack of jurisdiction. *See e.g., Rockwell v. New Jersey Transit Rail Operations, Inc.*, 682 F. Supp. 280 (D.N.J. 1988); *Laughinghouse v. North Carolina Ports Railway Comm.*, 679 F. Supp. 537 (E.D.N.C. 1988); *Fitchik v. New Jersey Transit Rail Operations, Inc.*, 678 F. Supp. 465 (D.N.J. 1988); and, *Dykman v. New Jersey Transit Rail Operations, Inc.*, 685 F. Supp. 79 (S.D.N.Y. 1988). In fact, this particular case was first filed in the United States District Court for the District of South Carolina, Charleston Division, but was dismissed after the *Welch* decision and subsequently brought in this Court.

In *Welch* the State of Texas advanced the argument that the Jones Act did not afford state employed seamen a remedy. However, the Supreme court found it unnecessary to address this issue having disposed of the matter on jurisdictional grounds. *Welch*, 97 L.Ed.2d at 398, n. 6. Likewise, the Federal District Court cases cited just above do not address the contention advanced by Defendant here, that FELA does not apply to state-owned railroads. Insofar as research efforts of the parties or of this Court have determined, no reported decision on this substantive issue exists and this would appear to be a matter of first impression.

QUESTIONS PRESENTED

1. Under the Federal Employer's Liability Act may a railroad worker employed by a state bring an action against the state for money damages for personal injury in the course of his employment when Congress has not

unequivocally expressed its intention to authorize an action for money damages against the state?

DISCUSSION

The Eleventh Amendment is in effect a jurisdictional bar. The Amendment states:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. Amend. 11.

While this is the only reference to sovereign immunity in the United States Constitution, it is established without question that the amendment simply broadened the sovereign immunity of the states which already existed in the United States as to their own state courts. *Welch v. State Department of Hwys. and Pub. Trans.*, 780 F.2d 1268, 1270 (5th Cir. 1986), *aff'd*, 483 U.S. ___, 97 L.Ed.2d 389, 107 S.Ct. ___ 1987); *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890); *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974).

It may appear that this question was answered in *Parden v. Terminal Railway*, 377 U.S. 184, 12 L.Ed.2d 233, 84 S.Ct. 1207, Reh. den. 377 U.S. 1010, 12 L.Ed.2d 1057, 84 S.Ct. 1903 (1964). However, that decision has been severely limited by subsequent decisions of the Supreme Court.

Parden held that the Eleventh Amendment did not bar an FELA action against a state owned railroad in

federal court. There, the core of the Supreme Court's holding was:

> *It remains the law that a state may not be sued by an individual without its consent.* Our conclusion is simply that Alabama, when it began operation of an interstate railroad *approximately twenty years after enactment* of the FELA, necessarily consented to such suit as was authorized by that Act.

Parden, 12 L.Ed.2d 233, 240. (Emphasis Added)

The holding of *Parden* has by subsequent decisions been all but expressly overturned.

The basis for the decision in *Parden* has been modified by the Supreme Court to such an extent that it is no longer good law. The holding in *Parden* should therefore not be followed. *Faust v. South Carolina State Hwy. Dept.*, 721 F.2d 934, 940 (4th Cir. 1983).

Whether or not a state may be sued in state court under FELA involves two distinct questions. The first is has Congress through express language abrogated the state's sovereign immunity under the Eleventh Amendment. The second is has the state through express language waived its sovereign immunity to be sued. In the present case Congress has neither abrogated South Carolina's immunity under the FELA statute nor has South Carolina waived its sovereign immunity to be sued under FELA.

In *Edelman v. Jordan*, 415 U.S. 651, 39 L.Ed.2d 662, 94 S.Ct. 1347 (1974), the Court held:

> The mere fact that a state participates in a program through which the Federal Government provides assistance for the operation by

> the state of a system of public aid *is not sufficient to establish consent on the part of the state* to be sued in the Federal Courts.

Edelman, 39 L.Ed.2d 662, 679. (Emphasis Added).

The Court in further modifying the "consent" holding of *Parden* stated:

> In deciding whether a state has waived its Constitutional protection under the Eleventh Amendment, we will find waiver only where stated "by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction." (Citing: *Murray v. Wilson Distilling Company*, 213 U.S. 151, 171, 53 L.Ed. 742, 29 S.Ct. 458 (1909).)

Edelman, 39 L.Ed.2d 662, 678.

In *Employees v. Missouri Public Health Dept.*, 411 U.S. 279, 36 L.Ed.2d 251, 93 S.Ct. 1614 (1973), the Court attempted to distinguish the *Parden* holding. However, their distinction was rather weak. The Court stated:

> The history and tradition of the Eleventh Amendment indicate that by reason of that barrier a federal court is not competent to render judgment against a non-consenting state. *Parden* involved the railroad business which Alabama operated "for profit."

Employees, 36 L.Ed.2d 251, 256.

The *Employees* decision involved a Fair Labor Standards Act suit by state employees. In that case the Supreme Court held that Missouri enjoyed sovereign immunity from suit in federal court by its employees seeking recovery under the Act. The Court recognized the question of whether individuals could bring an FSLA

action against the state in state court, however, they never reached the question in their opinion. *Employees*, 36 L.Ed.2d 251, 258.

Garcia v. San Antonio Metropolitan Transit Auth., 469 U.S. 528, 83 L.Ed.2d 1016, 105 S.Ct. 1005 (1985), involved the application of the federal minimum wage to state employees. There the Court held that applying the federal minimum wage requirements to a state run mass transit authority which received substantial federal aid was not destructive of the state sovereignty or violative of any constitutional provision. *Garcia*, 83 L.Ed.2d 1016, 1036.

The *Garcia* Court relied heavily on the fact that mass transit authorities operated by states receive substantial federal aid, thus the employees should also receive the benefits of the federal minimum wage requirements. The Court stated:

> In short, Congress has not simply placed a financial burden on the shoulders of states and localities that operate mass-transit systems, but has provided substantial countervailing financial assistance as well, *assistance that may leave individual mass-transit systems better off than they would have been had Congress never intervened at all in the area.*

Garcia, 83 L.Ed.2d 1016, 1036-7. (Emphasis Added)

The holding in that case by analogy would seem to apply FELA liability to the states. However, FELA is strictly a liability statute and not a regulatory statute as is FLSA. The Court on many occasions has distinguished between prospective relief granted to plaintiffs and relief which would allow a plaintiff to obtain a retroactive

monetary award which would be paid out of the state treasury. *Employees*, 36 L.Ed.2d 251, 258; *Welch*, 96 L.Ed.2d 389 n. 6 at 398.

In *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 87 L.Ed.2d 171, 105 S.Ct. 3142 (1985) the Court addressed the question of whether states and state agencies are subject to suit in federal courts by litigants seeking retroactive monetary relief under § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794.

The Court there reaffirmed the *Edelman* requirement that a state will be deemed to have waived its sovereign immunity only by the most express language. *Atascadero*, 87 L.Ed.2d 171, 178. As to whether Congress had abrogated the state's constitutional immunity in enacting the Rehabilitation Act the Court stated:

> Congress may abrogate the state's constitutionally secured immunity from suit in Federal Court only by making its intention *unmistakably clear in the language of the statute.*

Atascadero, 87 L.Ed.2d 171, 179. (Emphasis Added)

The Plaintiffs in *Atascadero* brought forth the argument that when Congress said "any recipient of federal assistance" that included the states since they were recipients of federal assistance. This is applicable here because FELA is worded as "every common carrier." The Court in addressing that argument stated:

> There is no claim here that the state of California is not a *recipient of federal aid under the statute.* But given their constitutional role, *the states are not like any other class* of recipients of federal aid. *A general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment.* When Congress chooses to subject the states to federal jurisdiction, it must do so specifically. (Citing: *Pennhurst II*, 465 U.S 89, 79 L.Ed.2d 67, 104 S.Ct. 900, Citing *Quern v. Jordan*, 440 U.S. 332, 59 L.Ed.2d 358, 99 S.Ct. 1139 (1979).)

Atascadero, 87 L.Ed.2d 171, 182.

It seems clear that from the Court's holding in *Atascadero* that the general language such as "any recipient of federal assistance" or "every common carrier" is insufficient to authorize suit in federal court under a federal statute. Therefore, the language in FELA is obviously not the specific language which the Supreme Court requires by Congress to abrogate the state's Eleventh Amendment immunity. And, therefore, should not be considered sufficient to abrogate a state's sovereign immunity.

Finally, in *Welch v. Dept. of Hwys. & Pub. Trans*, 483 U.S. ___, 97 L.Ed.2d 389, 107 S.Ct. ___ (1987), the Court held that the Jones Act did not authorize a seaman employed by a state to sue the state in federal court. The Court reiterated that Congress may abrogate the state's constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute. *Welch*, 97 L.Ed.2d 389, 395.

The Court further stated that it will find a waiver by the state only where stated by the most express language or by such overwhelming implications from the text as will leave no room for any other reasonable construction. *Welch*, 97 L.Ed.2d 389, 396. Further the Court stated that Congress had not expressed "in unmistakable statutory

language" its intention to allow states to be sued in federal court under the Jones Act. *Welch*, 97 L.Ed.2d 389, 398.

Therefore the plaintiff could not maintain an action against the state in federal court under the Jones Act.

More recently in *Rockwell v. New Jersey Transit Rail Operations, Inc.*, 682 F. Supp. 280 (D.N.J. 1988), the Court held that an action against a state under the Federal Employer's Liability Act (FELA) in federal court would not lie and was dismissed for lack of subject matter jurisdiction. The Court there stated that since Congress in neither the Jones Act nor FELA had set forth a clear and unmistakable intent to abrogate a state's Eleventh Amendment immunity the federal court could not entertain the suit. *Rockwell*, 682 F.Supp. at 283.

It seems clear that the Court has moved away from its consent argument in *Parden* in these subsequent cases. Now to allow a suit in federal court against a state the Court requires unequivocal language in the statute on the part of Congress to express the congressional intent to abrogate the state's immunity, or express language on the part of the state to waive its sovereign immunity.

The doctrine of sovereign immunity should apply as to whether a federal statute may be used to create a cause of action against the state by an individual in state court. Since the Supreme Court requires such express language to abrogate a state's Eleventh Amendment immunity it only seems appropriate that the same express language would be required by the Court to abrogate the state's sovereign immunity. If a state is not subject to suit in federal court without the express intention of Congress

under a federal statute, then the state should, as well, not be subject to suit in its own courts without the same express language.

Although several Supreme Court cases come close to the issue, no case has yet decided the question of whether an individual could maintain an FELA or Jones Act cause of action against a state in state court. The Court in *Welch* stated in a footnote:

> Because Eleventh Amendment immunity "partakes of the nature of a jurisdictional bar," (Citing *Edelman v. Jordan*) we have no occasion to consider the state's additional argument that Congress did not intend to afford seamen employed by the states a remedy under the Jones Act.

Welch, 97 L.Ed.2d 389, n.6 at 398.

Basically, the question of whether a state employee could maintain an action against a state under FELA in state court is a matter of first impression.

The case of *Mathewes v. Port Utilities Commission*, 32 F.2d 913 (D.S.C. 1929), held that a state owned railroad was liable under FELA. However, the reasoning applied in that case has been patently abandoned by the Supreme Court. There, the district judge relied on the language "every common carrier" to include state owned railroads. Obviously, the Court in *Atascadero* required much more than a general expression to abrogate a state's Eleventh Amendment immunity. Therefore, the holding and reasoning of *Mathewes* is no longer applicable. *Atascadero*, 87 L.Ed.2d 171, 182.

Since the State of South Carolina has not consented to FELA liability, and since Congress has not unequivocably expressed an intent to subject states to FELA liability, FELA does not apply to this Defendant.

Accordingly, Plaintiff has failed to state a claim against this Defendant upon which relief can be granted. It may be, however, that Plaintiff can demonstrate an entitlement to relief apart from FELA. Therefore, it is

ORDERED that the Complaint be, and it is hereby, dismissed but with leave to Plaintiff to file and serve an Amended Complaint within ten days of the date hereof if he be so advised. Defendant shall have ten days following service of such an Amended Compliant to respond thereto. In the event Plaintiff fails to file an Amended Complaint within the time allowed hereunder the Clerk is directed to forthwith enter judgment in favor of Defendant.

AND IT IS SO ORDERED.

/s/ Ellis B. Drew, Jr.
Ellis B. Drew, Jr.
Presiding Judge

ANDERSON, S.C.

October 31, 1988

ATTEST A TRUE COPY
HOWARD A. TAYLOR (SEAL)
CLERK

By David Alston
DEPUTY CLERK

APPENDIX G

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	IN THE COURT OF COMMON PLEAS
KENNETH HILTON, Plaintiff, vs.	)	CASE NO. 88-CP-10-705
SOUTH CAROLINA PUBLIC RAILWAYS COMMISSION, Defendant.	)	MOTION TO DISMISS

TO: WM. EARL HIGGINBOTHAM, ESQUIRE, BECKHAM, MCALILEY & SCHULZ, P.A. AND TO DONALD B. CLARK, ESQUIRE, ROSEN, ROSEN & HAGOOD, ATTORNEYS FOR PLAINTIFF:

PLEASE TAKE NOTICE that the Defendant, South Carolina Public Railways Commission, through its undersigned attorneys, will move before the Presiding Judge, Ninth Judicial Circuit, at such place and time as the Court may appoint, for an Order dismissing the within action pursuant to S.C.R.C.P. 12(b)(6) on the grounds that the Complaint fails to state facts sufficient to constitute a cause of action.

PLEASE BE PRESENT TO DEFEND IF SO MINDED.

/s/ Keating L. Simons
Keating L. Simons, III
HOLMES & THOMSON
100 Broad Street
Post Office Box 1090
Charleston, S.C. 29402
(803) 722-1634

ATTORNEYS FOR DEFENDANT

CHARLESTON, S.C.

April 4, 1988

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON KENNETH HILTON, Plaintiff, vs. SOUTH CAROLINA PUBLIC RAILWAYS COMMISSION, Defendant.	IN THE COURT OF COMMON PLEAS CASE NO. 88-CP-10-705 CERTIFICATE OF MAILING

The undersigned, Attorneys for Defendant, hereby certify that on the 4th day of April, 1988, a copy of the attached Motion to Dismiss was placed in an envelope with first-class postage, prepaid, and mailed to Wm. Earl Higginbotham Esquire, Attorney for Plaintiff, at his last known address, Beckham, McAliley & Schulz, P.A., Suite 3131, Independent Square, One Independent Drive, Jacksonville, Florida 32202 and to Donald B. Clark, Rosen, Rosen & Hagood, 45 Broad Street, Post Office Box 893, Charleston, South Carolina 29402.

/s/ Keating L. Simons
Keating L. Simons, III
HOLMES & THOMSON
100 Broad Street
Post Office Box 1090
Charleston, S.C. 29402
(803) 722-1634

ATTORNEYS FOR DEFENDANT

CHARLESTON, S.C.

April 4, 1988

APPENDIX H

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON KENNETH HILTON, Plaintiff, vs. SOUTH CAROLINA PUBLIC RAILWAYS COMMISSION, Defendant.	IN THE COURT OF COMMON PLEAS C/A NO: 88-CP-10- COMPLAINT

Plaintiff, KENNETH HILTON, sues Defendant, SOUTH CAROLINA PUBLIC RAILWAYS COMMISSION (COMMISSION), and alleges:

1. This is a civil action arising under Chapter 45 U.S.C. § 51, *et seq.*

2. At all times material hereto, the Defendant owned and operated a common carrier railroad engaged in interstate commerce, with its principal place of business at Charleston, Charleston County, South Carolina, and Plaintiff was an employee of Defendant working in the scope of his employment and in furtherance of interstate commerce.

3. On or about March 2, 1986, at or near the Defendant's shops at East Cooper Berkeley, Charleston, South Carolina, Plaintiff was injured as a result of Defendant's breach of duty when, he was required to manually move, unload and empty excessively heavy drums of water from the rear of Defendant's dumptruck, without adequate, competent co-workers and/or adequate mechanical equipment to assist him. During such process, it was necessary for Plaintiff to position himself on top of said

drums in order to obtain sufficient leverage to cause the drum to overturn so as to allow the water to flow from them out the rear of the dumptruck. During said process, Plaintiff was caused to lose his footing when he suddenly and unexpectedly slipped on water which resulted in his falling backwards from the top of said drums, striking his head and back against the truck body and adjacent drums.

4. At the above time and place, Defendant was negligent in the following acts of commission or omission, each of which contributed to causing Plaintiff's injuries:

(a) In negligently failing to exercise reasonable care to provide Plaintiff with a reasonably safe place to work.

(b) In negligently failing to provide Plaintiff with reasonably necessary tools and equipment in proper repair for the work that Plaintiff was required to do.

(c) In negligently failing to provide Plaintiff with a reasonably adequate number of coemployees and assistants to perform the work assigned to Plaintiff in a reasonably safe manner.

(d) In negligently failing to provide adequate supervision and planning to assure proper assistance, equipment and time for performing the duties required of Plaintiff.

(e) In negligently requiring Plaintiff to manually move, unload and empty said drums which Defendant knew, or reasonably should have known, were excessively heavy for the reasonably safe handling by a single individual.

(f) In negligently requiring Plaintiff to manually move, unload and empty said drums

when the same result could have been achieved by the reasonable and available operation of the dumptruck body.

5. As a result of the foregoing breach of duty, Plaintiff was seriously and permanently injured; among Plaintiff's injuries are injuries to his back, neck, head, nervous system and other injuries not yet diagnosed; and, said injuries and the conditions resulting therefore are continuing in their nature so as to cause Plaintiff injury, pain and disability, which will reasonably be expected to continue in the future.

6. As a result of the foregoing breach of duty, Plaintiff suffered injuries and damages, including loss of earnings, medical expenses, personal inconvenience, aggravation of a pre-existing injury and mental and physical pain and suffering due to the injuries to Plaintiff's body and nervous system, plus an inability to lead a normal life. These injuries are permanent, and in the future Plaintiff will suffer loss of wages, loss of earning capacity and medical expenses, personal inconvenience and mental and physical pain and suffering, plus an inability to lead a normal life.

WHEREFORE, Plaintiff demands judgment against the Defendant for damages in such sum as may be proved at the trial of this matter, interest on the judgment as provided by law, and for the costs of this action.

Plaintiff requests trial by jury.

/s/ Wm. Earl Higginbotham
Wm. Earl Higginbotham

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February 16, 1988 ATTORNEYS FOR PLAINTIFF